note and the security of Noble as endorser. Yet the defendants have released him without her consent. A creditor who receives a collateral security from a third party is bound, if he avails himself of the collateral, to preserve the original debt, for in equity the surety will be entitled to subrogation to it, and to release an indorser is so to impair the debt as to discharge the surety.

The decree below is affirmed.

In the New York Court of Appeals—June Term, 1861.

MARY P. DURANDO, APPELLANT, *vs.* CHARLES C. P. DURANDO ET AL., RESPONDENTS.

1. It is an inflexible rule that before the widow can be entitled to dower, the husband must have been seized, either in fact or law of an estate of inheritance in the land during coverture.
2. Hence, a simple reversion in fee or a vested remainder expectant on an estate for life, held or enjoyed by the husband, cannot create an estate of which the widow is dowable.
3. The meaning of the word "purchase," and the senses in which it is used in the law of realty.

The opinion of the Court was delivered by

SELDEN, J.—To entitle a widow to dower, a husband must have been seized, either in fact or in law, of an estate of inheritance in the land at some time during the coverture. This rule is inflexible. When, therefore, the husband had, previous to his death, simply a reversion in fee or a vested remainder, expectant upon an estate for life, his widow cannot be endowed, as in such a case the husband has never had either possession or any present right of possession; he cannot be said to have had a seizure of any sort, either actual or legal. It is conceded by the counsel for the appellant, that this rule applies where lands descend to the husband, subject to the right of dower of the widow of the ancestor; as if a father die intestate, leaving a widow and a son, and the widow is endowed, it is not claimed that the widow of the son, in case of his death in the lifetime of his father's widow, could ever be endowed of the lands which had been assigned for the dower of the latter. But it is

insisted that where the estate comes to the husband, not by inheritance, but by purchase, the widow may be endowed, notwithstanding her husband has only a remainder in the land.

This distinction, or rather the idea that it applies to this case, is evidently founded upon a misapprehension. It is true that where a father conveys lands to a son, subject to the contingent right of the wife of the father to dower, if the father dies and his widow is endowed, and before her death the son dies leaving a widow, the latter, if she survives the widow of the father, is entitled to dower in the lands of which such widow had previously been endowed. But the reason is not because there is any distinction between a vested remainder which comes by descent, and one created by deed, but because, in the case supposed, the son becomes actually seized of the estate in the lifetime of the father; and this seizin is sufficient to entitle his widow to dower, although his estate is contingent, and is defeated by the death of a father leaving a widow. I can discover no other foundation for the position assumed by the appellant's counsel, than the inapt use by Coke of a single word in a passage which I will quote. In speaking on this subject he says: "For example, if there be grandfather, father and son, and the grandfather is seized of three acres of land in fee, and taketh wife and dieth, this land descendeth to the father who dieth either before or after entry; now is the wife of the father dowable? The father dieth and the wife of the grandfather is endowed of one acre and dieth; the wife of the father shall be endowed only of the two acres residue, for the dower of the grandfather is paramount; the title of the wife of the father and the seizin of the father, which descended to him (be it in law or actual,) is defeated; and now upon the matter, the father had but a reversion expectant upon a freehold, and, in that case, *dos de dote peti non debet*, although the wife of the grandfather dieth, living the father's wife. And here note a diversity between a descent and a purchase. For, in this case aforesaid, if the grandfather had *enfoeffed* the father, or made an intail unto him, then in the case aforesaid, the wife of the father, after the decease of the grandfather's wife, should have been endowed of that part assigned to the grandmother; and the reason

of this diversity is, for that the seizin that descended after the decease of the grandfather to the father is avoided by the endowment of the grandmother; but in the case of the purchase or gift, that took effect in the life of the grandfather (before the title of dower of the grandmother was consummated) is not defeated, but only *quoad* the grandmother, and in that case these shall be *dos de dote.*" Coke Litt., 31, a. b.

The word purchase, which occurs in this paragraph, when used in contradistinction to descent, includes the obtaining of title by devise as well as by deed. But the whole reasoning of the passage quoted shows, that the effect attributed to a purchase follows only when the land is conveyed by a deed. The sole reason given for that distinction is, that purchase takes effect in the lifetime of the vendor, and the purchasor becomes at once seized of a defeasible estate; while in case of a descent, the heir is never seized of the lands assigned for dower, during the life of the widow, as her title relates back in all cases to the death of her husband. Now, in this respect, there is not the slightest difference between a descent subject to dower, and a devise subject either to dower or any other life estate. In either case the freehold passes directly to the tenant of the life estate upon the death of the ancestor or devisor, and neither the heirs nor the devisee of the remainder can have any seizin until the death of such tenant.

The distinction is stated in terms perfectly accurate and precise by the Chancellor, in the case of *Durham* vs. *Osborn*, 1 Paige, 634; but in the subsequent case of *Cregier* vs. *Osborn*, 1 Barb. Ch. R., 598, he uses the word purchase as it is used by Lord Coke, and states the distinction as being between estates which come to the husband, and those which come by purchase subject to dower. This inaccuracy in the use of the word purchase, by both Lord Coke and Chancellor Walworth, is perfectly palpable; but as it has led to the bringing up of so clear a case as the present to this court, it may be well to advert to and explain it. That it is this which has misled the counsel for the appellant, is obvious, as he commences his citations in support of his doctrine with the Year-Book, 5 Edw. 3, title Voucher 249, which appears to be the very authority upon

which Lord Coke based his distinction. None of the other authorities cited by the counsel have any tendency to support his position, and it is very clear that it is untenable.

The precise question was decided by the Supreme Court of Massachusetts, in the case of *Eldridge* vs. *Forrestal*, 7 Mass., 253; and in *Beekman* vs. *Hudson*, 20 Wend. 53, it was assumed as perfectly clear, that in such a case the widow was not entitled to dower.

There can be no pretence that the widow is entitled to the fund in question as personal estate, under the statute of distributions. The money is the product of the land taken, and must belong to the person entitled to the land which it represents, and out of which it arose. Besides, the title had already vested in the heirs when the proceedings for extending the street were commenced; and if the widow had then no right of dower in the premises, she of course can have no right to the money, even if it is to be considered personal estate.

The judgment of the Supreme Court must be affirmed.

J. M. Buckingham, attorney for appellant.

D. Thurston, attorney for respondents.

NOTICES OF NEW BOOKS.

ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS. By HENRY SUMNER MAINE, London. 8vo, 415 pp.

We have read every word of this work with pleasure, and hasten to commend it to the general reader as well as the professional student, and only regret that the space we can occupy in this jonrnal will be so inadequate to do it justice. If it does no more, it will help to show that there may be a literature in the law which may be cultivated to advantage, if men will bring to its study the taste of the scholar, as well as the research of the historian and diligent collector.

Mr. Maine was, at one time, Regius Professor of the Civil Law in Cambridge, England, and, as is stated in the title page of the work, is "Reader on Jurisprudence and the Civil Law at the Middle Temple." The work manifests great research as well as profound reflection, which, though guided chiefly by the light of the learning of the civil law, aims to reach higher functions than the code or the twelve tables. Its first chapter